No. 96-6867

In the Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

REPLY BRIEF OF PETITIONER

IMMINENT EXECUTION SCHEDULED FOR DECEMBER 18, 1996

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December 11, 1996

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REPLY BRIEF FOR PETITIONER

For the reasons discussed below, none of the arguments advanced by the Commonwealth in its opposition brief justify denying review of O'Dell's petition for certiorari.

O'Dell is scheduled to be executed in just seven days.[1/] No case will present these important questions any more starkly or urgently.

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* ANNOUNCED A NEW RULE FOR PURPOSES OF *TEAGUE*

A. No Other Federal Court Agrees With the Fourth Circuit Majority on the *Teague* Issue Presented Here

At the outset of its opposition brief, the Commonwealth asserts that "all the circuit courts . . . that have addressed the issue agree with the Fourth Circuit that the law at the time O'Dell's case became final did not 'compel' the rule in *Simmons*." Opp. Br., "Questions Presented." Even the majority below, however, did not claim that any court of appeals has addressed, much less agreed with it on, this issue. In truth, as the dissenters pointed out, there is "no authority from other federal appellate courts that addresses squarely the issue before us." 95 F.3d at 1257 n.4. (App. 86a.)

Even a cursory look at the two court of appeals decisions cited by the Commonwealth shows that they involved different questions. The first decision, *Stewart* v. *Lane*, 70 F.3d 955 (7th Cir. 1995), *supplementing* 60 F.3d 296, *cert. denied*, 116 S. Ct. 2580 (1996), addressed whether, for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989), *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994), announced a new rule for a conviction that became final *prior to* this Court's decision in *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). Indeed, in its initial decision in *Stewart* -- a decision the Commonwealth neglects to cite -- the Seventh Circuit expressly *distinguished* the situation presented here, where the conviction at issue became final *after Skipper*. 60 F.3d at 302 n.4. And, as noted in the Petition, Pet. 8, the Seventh Circuit went so far as to opine that, in this case, the opposite result should obtain, because "it is arguable that *Skipper* compels the result in *Simmons*." *Id.*

The second decision cited by the Commonwealth, *Johnson* v. *Scott*, 68 F.3d 106 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1358 (1996), is no more relevant. In *Johnson*, the petitioner was sentenced under Texas law, which, unlike Virginia law, did not provide for life imprisonment without the possibility of parole. *Id.* at 111. There, the petitioner sought an *extension* of *Simmons*, that, whatever its validity today, could not have been thought compelled at the time of the petitioner's conviction. *Id.* Here, by contrast, there is no question that the precise rule announced in *Simmons* would invalidate O'Dell's sentence.[2/]

1/ Yesterday, O'Dell applied in this Court for a stay of execution. As noted in the Petition, Pet. 5 n.2, O'Dell sought a stay from the court of appeals three weeks ago. Yesterday, the court of appeals denied the stay by a 7-6 vote.

2/ The Commonwealth also relies on decisions of two state supreme courts. Opp. Br. 6 n.2. However, because *Teague* involves a question of federal law applicable to federal habeas proceedings, state court decisions on this issue are, at best, merely persuasive authority.

The two decisions cited by the Commonwealth do not rise even to that level. In *Mueller* v. *Murray*, 1996 WL 631758 (Va. Nov. 1, 1996), the Virginia court simply adopted the view of the majority opinion of the Fourth Circuit, without any independent analysis. *See id.* at *6. In *Commonwealth* v. *Christy*, 656 A.2d 877, 888-89 (Pa.), *cert. denied*, 116 S. Ct. 194 (1995), the Pennsylvania court concluded that, even if *Simmons* were compelled by this Court's prior precedents, it announced a new rule under Pennsylvania law. *Id.* at 889 n.22.

(continued...)

In fact, there is a "unanimity" of judicial opinion on the issue presented here, as the Commonwealth asserts. Opp. Br. 6. But, as noted in the Petition, Pet. 8, it is *contrary* to the majority's decision below. *See Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995); *Spreitzer* v. *Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996).[y]

Further, contrary to the Commonwealth's assertion, it is not "premature" to grant review of the *Teague* issue at this time. Opp. Br. 6. That issue is squarely presented in this case, and the majority and dissenting opinions below articulated the opposing arguments. This Court should not, as the Commonwealth recommends, allow further "percolation" of this issue in the federal courts, Opp. Br. at 6, where "percolation" of this issue means the carrying out of death sentences imposed on a legally suspect basis. Such "percolation" would serve no useful purpose here.

B. The Question Presented Is an Important One

Notwithstanding its prediction of additional "percolation" of the *Teague* issue in the federal courts, the Commonwealth argues that review is inappropriate here because the retroactivity issue will affect "not only a small, finite number of cases, but

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[y] (...continued)
It is significant that the same federal district court that earlier held to the contrary in *Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995), expressly rejected *Christy* for purposes of federal habeas proceedings, and adhered to its earlier ruling. *Banks* v. *Horn*, 928 F. Supp. 512, 518 (M.D. Pa. 1996).

[y] The Commonwealth makes no attempt to refute or distinguish these considered decisions, except to dismiss them as district court decisions and, in the case of *Spreitzer*, to suggest that it is "contrary to its own circuit precedent" of *Stewart*. Opp. Br. 7 n.4. *Spreitzer*, however, expressly distinguished the Seventh Circuit's previous decision in *Stewart* on exactly the same grounds that the Seventh Circuit itself distinguished *Stewart* from this case, i.e., that the conviction in *Stewart* became final *prior to* this Court's decision in *Skipper*. *See Spreitzer*, 1996 WL 48585, at *4-*6.

a number that is certain to ***decrease*** with the passage of time." Opp. Br. 7 (emphasis in original).

In this regard, the Commonwealth points out that, as this Court itself noted in *Simmons*, only two states other than Virginia had a sentencing system like the one at issue here. Opp. Br. 7 (quoting *Simmons*, 114 S. Ct. at 2196 n.8). Thus, the Commonwealth makes the odd argument that the aberrational nature of Virginia's sentencing system militates *against* review by this Court. Nevertheless, even the Commonwealth's premise is mistaken. As noted above, there are already two other reported federal cases raising the same issue as O'Dell, and, as stated in the Petition, counsel is aware of at least two pending cases in Virginia alone that raise the same question. Pet. 8 n.5.

In contending that the number of cases raising this issue "is certain to ***decrease*** with the passage of time," Opp. Br. 7 (emphasis in original), the Commonwealth presumably means that this is a retroactivity issue. This case, however, concerns not only the *result* of this retroactivity question, but also the unprecedented "fact/law" construct that led the majority below to reach this result. That construct will bind the lower courts on every *Teague* issue within the Fourth Circuit and, as shown in the Petition, it is at odds with the interpretation of *Teague* enunciated by this Court and other Circuits. *See* Pet. 15.

C. *Ramos* Does Not Support the Fourth Circuit Majority's Decision

In defending the majority's purportedly "straightforward" application of *Teague*, Opp. Br. 8, the Commonwealth, like the majority itself, is forced to go to

extreme lengths to avoid the obvious -- and expressed -- conclusion that *Simmons* was "compelled" by *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper*.

Thus, the Commonwealth embraces the unprecedented "fact/law" distinction posited by the majority, Opp. Br. 9, even though the Commonwealth never suggested such a distinction in the proceedings below. The Commonwealth, however, does not even attempt to defend this artificial distinction in the face of the deficiencies outlined in the Petition. *See* Pet. 13-14.

Instead, the Commonwealth relies principally on this Court's decision in *California* v. *Ramos*, 463 U.S. 992 (1983). In the process, it distorts the significance of that decision even further than the majority. Thus, the Commonwealth asserts that "[t]he very argument later ***accepted*** in *Simmons* . . . ***expressly was rejected*** in *Ramos*," and that *Ramos* was "***contrary*** to the rule later embraced in Simmons." Opp. Br. 10, 7 n.4 (emphasis in original). Indeed, echoing the majority's remarkable claim that a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only *not* compelled, but *forbidden*" by *Ramos*, 95 F.3d at 1231-32 (App. 31a) (emphasis added), the Commonwealth asserts that *Ramos* was "diametrically opposed" to a conclusion that "*Gardner* and *Skipper* supported the due process rule announced later in *Simmons*." Opp. Br. 10.

However, as discussed in the Petition, *Ramos* is entirely consistent with this Court's previous decision in *Gardner* and its subsequent decisions in *Skipper* and *Simmons*. *See* Pet. 11-14. Certainly, this Court did not suggest in *Skipper* or *Simmons* that these decisions stood in any "tension" with *Ramos*, much less that they were in any

way "opposed" or "contrary" to it.[4] Nor did this Court in *Ramos* perceive any "tension" between it and *Gardner;* indeed, *Ramos* expressly recognized that, as previously held in *Gardner,* when the prosecution puts "inaccurate information" before the sentencer, the defendant has a right to "explain or deny" it. *Ramos*, 463 U.S. at 1004.

In short, the Commonwealth's opposition brief only demonstrates that, at a minimum, there is substantial reason to question the correctness of the majority's determination of the *Teague* issue, and that this issue is an important one, both in its own right and in its implications for the continuing application of *Teague* by the lower courts.[5]

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[4] The Commonwealth itself admitted during oral argument in the court of appeals that "[t]hey did not have to overrule *Ramos* to write the *Simmons* opinion." 95 F.3d at 1260 (dissenting opinion, quoting the Commonwealth). (App. 93a).

[5] The Commonwealth dismisses as a "smokescreen" the fact that the court of appeals split 7-6 on this issue. Opp. Br. 6 n.3. Indeed, the Commonwealth incongruously contends that this split "only highlights the point that, in 1988, reasonable jurists could have disagreed over the question of whether a '*Simmons*' rule was dictated by precedent." Opp. Br. 6 n.3. Of course, the issue that divided the court of appeals was whether a reasonable jurist *in 1988* could have thought that the rule in *Simmons* was compelled by *Gardner* and *Skipper*, not whether a reasonable jurist *today* could come to different conclusion on that issue.

The Commonwealth also suggests that, even if the rule of *Simmons* were applicable here, any constitutional error would have been harmless. Opp. Br. 13-14. The majority, however, expressly declined to rest its decision on this ground. 95 F.3d at 1239 n.14. (App. 46a). As the dissenters explained in detail, the *Simmons* violation in this case cannot reasonably be considered harmless. *Id.* at 1261-62. (App. 95a-97a).

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

According to the Commonwealth, the rule of *Simmons* does not fall within the second exception to *Teague* because it is merely "an unexpected refinement of this Court's evidentiary requirements in capital sentencing," and one that is "evidentiary, fact and procedure-dependent." Opp. Br. 13.

Yet, the concurring Justices in *Simmons* joined in reversing the conviction there expressly because it is a "hallmark[] of due process" that any capital or non-capital defendant is entitled to "meet the State's case against him." *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring).

Although the rule announced in *Simmons*, like all legal rules, arose out of a particular set of factual circumstances, that in no way detracts from its stature as a rule that implicates "the fundamental fairness and the accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). The Commonwealth does not -- and could not -- suggest that *Simmons* fails to protect a capital defendant against a misinformed and mistaken decision that could cost him his life.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DNA EVIDENCE IS A SUFFICIENT SHOWING OF ACTUAL INNOCENCE UNDER *SCHLUP*

A. Certiorari May Appropriately Be Granted to Review O'Dell's Claim of Actual Innocence

The Commonwealth opposes certiorari for O'Dell's actual innocence claim on the ground that the court of appeals below "merely applied settled precedent to the facts of this particular case," and therefore this is "not the type of decision this Court reviews on certiorari." Opp. Br. 16.

Contrary to the Commonwealth's characterization of the court of appeals' determination, this was not a "routine" application of a "firmly established 'actual innocence' standard." Opp. Br., "Questions Presented." The court of appeals insisted on applying the new *Schlup* standard itself, rather than allowing the district court to apply it in the first instance. In doing so, the court of appeals misapplied it. *See* Pet. 26-27. Moreover, as discussed in the Petition, the court of appeals made numerous factual errors and misleading characterizations of the factual record. *See* Pet. 18-23; *see generally* App. Vol. II.

Under the circumstances, we respectfully submit, this Court may appropriately exercise its certiorari power to ensure that O'Dell's actual innocence claim receives the "meaningful federal habeas review" that it deserves. *O'Dell* v. *Thompson*, 502 U.S. 995, 995 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). (App. 176a).

B. O'Dell Did Not Misrepresent the Results of the DNA Testing

Despite its rhetoric, the Commonwealth never confronts the fundamental fact that, as the district court expressly found, the DNA testing shows that the only meaningful blood evidence is *exculpatory*: the blood on the shirt "could not have come from Schartner" (App. 102a), and no determination about the blood on the jacket can be made. 95 F.3d at 1249. (App. 68a, 128a.) When presented with this evidence after the denial of state habeas relief, three Members of this Court observed that it "raises serious questions about whether petitioner was guilty of the charged crime." *O'Dell*, 502 U.S. at 995. (App. 176a.)

Rather than addressing the merits of the DNA evidence, the Commonwealth repeatedly charges that O'Dell "grossly misrepresented the facts of his case" in his earlier petition and "***deliberately withheld from this Court***" "crucial information" about the DNA evidence. Opp. Br. 1, 15 n.13, 16 n.14 (emphasis in original). The Commonwealth's accusations are entirely baseless.[6/]

The Commonwealth asserts that "***O'Dell's*** own post-trial retesting of the evidence by LifeCodes, Inc. demonstrated a DNA match between the blood on his jacket and the victim's blood," and that this "critical fact," "no doubt, caused three members of this Court to express doubt about O'Dell's guilt." Opp. Br. 16 n.14 (emphasis in original). Yet, after holding an evidentiary hearing on the question, the district court below accepted the results of the LifeCodes tests (i.e., the reported measurements for each of the bands), but expressly rejected LifeCodes' *interpretation* of those results as

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[6/] Counsel of record for the Commonwealth is an attorney who has not appeared in this case before, and her zeal appears to exceed her grasp of the relevant facts.

they related to the jacket. (App. 128a.) As shown in the Petition, LifeCodes' *interpretation* was faulty because it purported to "correct" for band shifting using a controversial procedure that has been rejected by other laboratories and the scientific community. *See* Pet. 28 n. 13; *see also Hayes* v. *Florida*, 660 So. 2d 257, 264 (Fla. 1995) (holding DNA "match" obtained by LifeCodes using band shifting "inadmissible as a matter of law"). After hearing opposing experts on the question and reviewing all the DNA evidence, the district court agreed with O'Dell's interpretation of the results. (App. 128a.)

The court of appeals did not -- and could not -- hold the district court's finding of fact regarding the DNA testing to be clearly erroneous. Nor does the experts' dispute about the jacket detract from the undisputed fact that "[t]he Commonwealth's experts agreed that the DNA tests proved that the blood on O'Dell's *shirt* came from neither Schartner nor O'Dell." 95 F.3d at 1248. (App. 67a) (emphasis added).

As explained in the Petition, *see* Pet. 27-28, the district court's undisturbed factual findings regarding the DNA testing undermine all of the admittedly "circumstantial evidence" presented by the Commonwealth. Opp. Br. 16. Moreover, this supposed "mountain of circumstantial evidence," Opp. Br. 16, is, truly, a molehill: the court of appeals' recitation of the facts is riddled with errors and mischaracterizations, which are set forth at length in the Petition and Volume II of the Appendix.[7/]

[7/] Although the Commonwealth claims that the summary of factual errors in the court of appeals' decision contained in Volume II of the Appendix was "improper[]," Opp. Br. 17 n.15, it does not explain why that is so. Moreover, although the Commonwealth claims that (continued...)

O'Dell's claim that the court of appeals misapplied the *Schlup* standard in his case merits review by this Court. At a minimum, O'Dell deserves a full evidentiary hearing on his claim of actual innocence.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for certiorari should be granted.

Dated: December 11, 1996

Respectfully submitted,

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7/ (...continued)
the summary is "inaccurate" and "[t]he accurate record of facts is recounted in the Fourth Circuit's opinion," *id.*, it does not bother to challenge specifically even a single factual statement made in Volume II.

Similarly, the Commonwealth charges that "O'Dell misrepresents the facts throughout his petition." *Id.* The only example the Commonwealth offers, however, is of Steven Watson's subsequent recantation of his trial testimony. *Id.* After tacitly criticizing O'Dell for asking the Court to take judicial notice of a published newspaper article reporting Watson's recantation, the Commonwealth goes on to make a number of unsworn assertions regarding Watson's purported retraction of his recantation. *Id.*

The Petition directed the Court's attention to the newspaper article in order to avoid enlarging the factual record on appeal. Pet. 28 n.14. Whatever the truth of the Commonwealth's latest allegations regarding Watson, no reasonable jury, had it known of all the evidence concerning Watson's veracity, could have convicted O'Dell on the basis of his testimony.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Paul H. Schoeman, being duly sworn, deposes and says:

1. I am not a party to the action, am over the age of 18, and am employed by Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019.

2. On Wednesday, December 11, 1996, I served one (1) copy of the attached REPLY BRIEF OF THE PETITIONER on:

Katherine Baldwin
Assistant Attorney General
900 Main Street
Richmond, VA 23219
(804) 786-4624

3. I made such service by personally enclosing a true copy of the aforementioned document in a properly addressed, postage paid wrapper and depositing it into a depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Paul H. Schoeman

Sworn to before me this
11th day of December, 1996

Notary Public
NORMA SOTO
Notary Public, State of New York
No. 41-4693337
Qualified in New York County
Commission Expires June 22, 1997